IN THE

Supreme Court of the United States

October Term, 1960

No. 542

MARIO DiBELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Mario DiBella, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on November 23, 1960, affirming an order of District Judge Leo F. Rayfiel of the United States District Court for the Eastern District of New York, denying petitioner's motion for an order of suppression pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the District Court denying petitioner's motion to suppress on the grounds of an unlawful search and seizure is reported in 178 F. Supp. 5; it appears as Appendix A in this petition, *infra*, pp. 21-30. The District

Court wrote no other opinion. The opinion of the Court of Appeals affirming the denial of the motion to suppress has not yet been reported; it appears as Appendix B to this petition, *infra*, pages 31-45).

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a narcotics agent may enter a suspect's dwelling in the nighttime without a search warrant or a valid warrant of arrest and search the premises.

2. Whether a nighttime entry into a dwelling to arrest a person upon probable cause that he had committed a felony under circumstances where a warrant could have been sought is consistent with the Fourth Amendment.

3. Whether a narcotics agent who makes an arrest under an invalid warrant can subsequently justify the arrest by recourse to the Narcotics Control Act.

4. Since probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, may a narcotics agent enter a suspect's home in the nighttime and make an arrest on probable cause that a crime has been committed and then as an incident thereto make a search of the dwelling.

5. Whether under the Narcotics Control Act an agent may enter a suspect's home in the nighttime, make an arrest

and a search as an incident thereto in the absence of special circumstances.

6. Where an application for a search warrant has been denied by a United States Commissioner and an invalid warrant of arrest executed is not a search as an incident thereto in violation of the Fourth Amendment.

7. Whether reasonable grounds exist for a nighttime arrest of a suspect in his dwelling when said arrest is made seven months after the alleged commission of the crime.

8. Whether reasonable grounds for a nighttime arrest under the Narcotics Control Act can be predicated upon a hearsay statement made by a narcotics agent to the arresting narcotic agent.

9. Does not a complete untrammeled action on the part of a narcotics agent under the Narcotics Control Act violate the Fourth Amendment.

10. In the absence of proof that the petitioner might flee before a warrant could be obtained was not his arrest and the subsequent search of his apartment a violation of of the Fourth Amendment.

11. Whether the petitioner's arrest was made as a pretext to search his apartment for evidence of contraband.

12. Does the mere fact that an immediate search follows the arrest conclusively establish the reasonableness of the search.

Constitutional Provisions and Statute Involved

The constitutional provision involved is the Fourth Amendment.

The following provisions of 26 U.S.C. Sec. 7607, which states that, among others, agents of the Bureau of Narcotics may:

> "(2) Make arrests without warrants for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marijuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Statement of the Case

On October 6, 1958, Federal Narcotic Agents Costa and Moynihan presented to United States Commissioner Abruzzo their sworn affidavits to obtain a warrant to search the petitioner's apartment (25a-31a).* Commissioner Abruzzo denied the application (51a-52a). On October 15, 1958, Agent Costa presented a complaint praying for the arrest of the petitioner, to United States Commissioner Epstein in the Eastern District of New York (7a). Upon the basis of this complaint, Commissioner Epstein issued a warrant of arrest (21a, 22a).

On March 9, 1959, narcotic agents saw petitioner sitting in the living room of his apartment. At 8:15 p.m. Agent Costa with the warrant of arrest in his possession, went with other agents to the petitioner's apartment. It was nighttime. The agents rang the bell and the door was opened by petitioner's stepdaughter. The agents identified themselves, showed her their credentials, walked into the living room, where they identified themslves to petitioner. Agent Costa showed petitioner a copy of the warrant of

* Page numbers in parenthesis refer to printed appendix.

arrest, and placed him under arrest. An examination of the apartment revealed the presence of narcotics (5a, 33a-34a). Agent Costa filed his return in the Clerk's office in the United States District Court indicating that he had arrested the petitioner on March 9, 1959 pursuant to the warrant of arrest issued by Commissioner Epstein (21a-23a). Both the majority and minority opinions in the Court below held that the warrant of arrest was invalid (Appendix B, *infra*, pp. 36, 46).

Appellant was arraigned before a United States Commissioner for the Eastern District of New York on March 10, 1959, and bail was fixed (23a-24a).

A motion was made prior to the filing of an indictment to suppress the items seized by the agents on March 9, 1959, on the ground that the seizure was illegal and the search unlawful in violation of the Fourth Amendment and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure (3a-4a).

This motion to suppress was argued before District Judge Rayfiel on August 25, 1959. At the conclusion of the oral argument, Judge Rayfiel reserved decision and directed that all papers be served and filed by September 11, 1959 (80a).

On November 4, 1959, the District Judge denied the motion in all respects, without prejudice, to a renewal thereof on the trial. The order denying the motion was signed on November 30, 1959. Petitioner filed his notice of appeal on December 3, 1959 (89a, 91a, 92a).

The appeal was heard on June 14, 1960, before a panel of the Court of Appeals consisting of Judges Waterman, Moore and Hamlin (the latter, a Judge of the Ninth Cir-

cuit, sitting pursuant to statutory designation). On November 23, 1960, the Court handed down its judgment of affirmance with Judge Waterman dissenting (Appendix B, *infra*, pp. 45, 58).

Reasons for Granting the Writ

This case presents questions, never before submitted to this Court, whose resolution is vital to the administration of justice in the Federal courts. Of primary significance are the questions as to the scope of the Narcotics Control Act and its relationship to the Fourth Amendment. There is no Supreme Court case upholding an officer's acts, where a home was searched by the officers armed with neither an arrest warrant nor a search warrant (Appendix B, *infra*, p. 55).

The disagreement in the Court of Appeals in the consideration of these issues is reflected in the vigorous dissent of Judge Waterman (Appendix B, *infra*, pp. 46-58).

1. There is first the extremely important question whether narcotic agents may enter a suspect's home in the night time without a search warrant or a valid warrant of arrest and search the premises. In regards to this vital issue, Judge Waterman in his dissenting opinion said (Appendix B, *infra*, pp. 54-56).

> "Two factors distinguish the instant case. First, in Harris (Harris v. United States, 331 U. S. 145) and Rabinowitz (United States v. Rabinowitz, 339 U. S. 56, 65-66) a valid warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. There is no Supreme Court case upholding the officer's acts where a home was searched

by officers armed with neither an arrest warrant nor a search warrant. Draper v. United States, supra, involved the search of a prisoner's person; Brinegar and Carroll the search of the prisoners' automobiles. It is certainly clear that, 'There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear.' United States v. Kanceso, 252 F. 2d 220, 223 (2 Cir. 1958). Citing Justice Douglas in McDonald v. United States, 335 U. S. 451, 455-456. • • •

Second, in further contrast to Harris and Rabinowitz, DiBella's arrest and the subsequent search of his residence occurred in the night-time. Rule 41 (c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to day-time execution unless the affidavit indicates positively that the objects to be seized are upon the premises. See also Distefano v. United States, 58 F. 2d 963 (5 Cir. 1932). In Jones v. United States, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41 (c) are 'hardly compatible with a principle that a search without a warrant can be based merely upon probable cause.' To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of Harris and Rabinowitz,

but is amplifying and extending the doctrine of those cases * * * ".

The majority opinion in the court below has over-extended the principle of law that a search may be made as an incident to a warrantless arrest. *In United States* v. *Harris, supra,* and *United States* v. *Rabinowitz, supra,* the searches were made as an incident to a valid warrant of arrest. In the instant case, the search was made as an incident to an invalid warrant of arrest. *Harris* and *Rabinowitz* therefore do not apply to the facts in our case. The Court of Appeals held that since Agent Costa had reasonable grounds to believe that the petitioner had committed a narcotics crime in August and September 1958, his arrest of petitioner in the night-time in his apartment on March 9, 1959 was lawful, therefore, a search of petitioner's apartment was proper, citing *United States* v. *Rabinowitz, supra* (Appendix B, *infra,* p. 45).

There was no evidence presented to the District Judge why the petitioner who had been under surveillance by the Agents for seven months was visited by agents in his apartment and arrested. Neither the affidavit of the Assistant United States Attorney nor the affidavits of Agents Costa and Moynihan reflected any reasons for the sudden arrest of petitioner (8a-20a, 25a-31a).

Parenthetically, it should be noted that the Agents' affidavits were executed on October 6, 1958 (27a-31a). These affidavits obviously could not reflect what transpired on March 9, 1959. There was nothing before the District Judge to indicate a vital necessity to enter petitioner's apartment and arrest him. Affidavits executed five months

prior to the arrest were utilized by the District Judge in finding that reasonable grounds existed to arrest petitioner (Appendix A, *infra*, pp. 23, 26).

Reasonable grounds for an arrest under the Narcotics Control Act are equivalent to the probable cause required under the Fourth Amendment, *Draper* v. *United States*, 358 U. S. 307. Various Courts of Appeals in cases where arrests without warrants have been sought to be justified as having been made upon probable cause have felt constrained to discover special circumstances, to wit: that the suspect would flee before the warrant could be obtained; that the contraband would be either destroyed or removed before the obtainance of a warrant, to justify the arrests. *United States* v. *Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States* v. *Volkell*, 251 F. 2d 333, 336 (2 Cir.) cert. denied, 356 U. S. 962 (1958); *United States* v. *Walker*, 246 F. 2d 519, 527 (7 Cir. 1957).

Special circumstances to justify the arrest are not present in the instant case. An application for a search warrant had previously been denied (51a-52a). An invalid warrant of arrest had been issued (Appendix B, *infra*, p. 36). To justify the search and seizure herein would be to circumvent the Fourth Amendment and allow the Narcotics Control Act to transcend the Constitution. It would permit narcotic agents to by-pass the Fourth Amendment with impunity. The United States Commissioner would be evicted from his judicial function. The narcotics agent would in effect be the judge of the existence of probable cause; the officer making the arrest and as an incident thereto searching a suspect's apartment whenever he so desired irrespective of the time of day. This would be a very dangerous amalgamation of powers.

The illegal arrest of the appellant in the privacy of his apartment on an invalid warrant of arrest should not be metamorphosed into a valid arrest under the Narcotics Control Act. This act cannot take away the safeguards embodied in the Fourth Amendment.

It was said in *Nathanson* v. *United States*, 290 U. S. 41 on page 47:

> "The Amendment (4th) applies to warrants under any statute, revenue, tariff and all others. No warrant inhibited by it, can be made effective by any act of Congress or otherwise".

It is petitioner's contention that the Government must not only prove that an agent had reasonable grounds to arrest a suspect in his dwelling but in addition must prove that the agent had reasonable grounds to enter the dwelling.

Implicit in the establishment of reasonableness is the *sine qua non* of good faith. Agent Costa had in his possession the warrant of arrest for five months before he executed it. There were no special or unusual circumstances present to justify the agents entering petitioner's apartment in the nighttime. Such an entry was an act of bad faith on the part of the agents and a subterfuge to search the apartment.

See: Harvard Law Review,—Vol. 74, p. 158. As Judge Waterman stated, Appendix B. *infra*, p. 58.

> "Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis

of an exhaustive search of appellant's home.[1] To condone such activity 'is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.' United States v. Rabinowitz, supra, at 80 (Frankfurter, J., dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents".

[1] There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.

In order to justify the entrance into petitioner's apartment, the Government had the burden of proving the necessity for such entry. Particularly is this so when it is a night-time entry. The fact that subsequent to petitioner's arrest, the agents found narcotics in his apartment does not justify the arrest.

An arrest is not justified by what a subsequent search discloses.

Henry v. *United States*, 361 U. S. 98.

The Government failed to sustain its burden because it did not submit any proof from any of its agents to explain or justify their night-time entry into petitioner's apartment.

2. In the face of the denial of a search warrant by Commissioner Abruzzo and the arrest of petitioner under an invalid warrant, the Government's contention that the agents had the right to enter petitioner's apartment in the night-time, arrest him pursuant to the Narcotics Control Act and thereafter make a search as an incident thereto, should not be countenanced.

It is undisputed that Agent Costa arrested petitioner by virtue of the invalid warrant in his possession (21a-22a, 76a). He did not arrest petitioner under the Narcotics Control Act. He was thinking solely in terms of exercising the authority vested in him because of the said warrant. He never exercised any judgment as to "reasonable ground" (i.e. "probable cause"). Since arrest on probable cause assumes such an exercise of judgment, the Government is in no position to justify an arrest without a warrant, where the arresting officer considered nothing other than his power to execute the warrant of arrest.

It is apparent that the thought of arresting petitioner without a warrant by recourse to the Narcotics Control Act, never entered the minds of the arresting agents. This theory advanced for the first time on the argument of the motion to suppress was a figment of the mental creativeness of the United States Attorney.

Giordenello v. *United States*, 357 U. S. 480.

3. Probable cause for belief that certain articles are in a dwelling cannot of itself justify a search without a warrant.

Agnello v. *United States*, 269 U. S. 20.

A fortiori, probable cause to justify the arrest of a suspect in his dwelling, in the night-time, and to make a search as an incident thereto, should have no greater validity than the exercise of probable cause in searching an apartment without a warrant.

As was said by Justice Harlan in *Jones* v. *United States*, 357 U. S. 493, 498-499, that the provisions relative to night-time search in Rule 41 (c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause".

4. Reasonable grounds as contemplated by the Narcotics Control Act did not exist for the arrest of petitioner on March 9, 1959.

Judge Waterman in expressing his belief that "reasonable grounds" (i.e. "probable cause") did not exist said (Appendix B, *infra*, p. 47).

> "There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the present case • • •
>
> What evidence is offered in this case to justify a judicial finding that Agent Costa has 'reasonable grounds' (i.e. 'probable cause') to arrest DiBella without a warrant? Agent Costa had been told a statement by one Panzarella, a narocotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales Dibella and Panzarella had met in a car. Costa did

not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958, a defective warrant was issued. On March 9, 1959, DiBella was arrested by the agents in the evening as he was sitting in his living room. It is claimed that during this five months period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant (Id. 49) * * *

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcootics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. United States v. Joines, 258 F. 2d 471 (3 Cir.), cert. denied, 358 U. S. 880 (1958). The unreasonablenesss of a delay would depend upon the circumstances present in the particular situation, but thus far, no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the

> warrant where there has been opportunity in the meantime to make the arrest. (Id. 51, 52, citing cases). • • •
>
> The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in Dailey v. United States, 261 F. 2d 870, 872 (5 Cir. 1958) cert. denied, 359 U. S. 969 (1959), the court stating that the arresting officer 'may defer the arrest for a day, a week, two weeks, or perhaps longer.' Surely in the present case where no evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale 'probable cause'. I would hold that the arrest of a person who has been under surveillance for seevn months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale" (Id. 52, 53).

The majority opinion in holding that Agent Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics law rely upon *Jones* v. *United States*, 362 U. S. 257, 259 (Appendix B, *infra*, p. 43).

However, there are many areas of difference between *Jones* v. *United States, supra*, and the instant case.

In the *Jones* case we find in the affidavit of Detective Didone seeking a search warrant, the following:

1. Detective Didone received information that Cecil Jones and Earline Richardson were involved in narcotics.
2. That they kept a ready supply of heroin in their apartment.
3. The informant mentioned that the narcotics were either on their person, under a pillow, on a dresser, or on a window ledge in said apartment.
4. The informant stated that on many occasions he had purchased drugs from Jones and Richardson in their apartment.
5. Jones and Richardson were familiar to the Detective and other members of the Narcotics Squad.
6. Jones and Richardson were narcotic addicts.
7. The same information regarding the illicit narcotic traffic conducted by Jones and Richardson had been given to Didone by other sources of information.
8. The informant had given Didone correct information on other occasions.

In our case, we find:

a. That in August 1958, Agent Costa saw DiBella leave his premises, enter his car, drive to 37th Avenue and 79th Street, Jackson Heights, Queens, New York, where DiBella met Panzarella. Panzarella entered the automobile and was driven to Roosevelt Avenue and 79th Street in Jackson Heights, Queens. Panzarella left the car and later met Agent Moynihan and gave the agent an envelope containing heroin.

b. The same procedure was followed in September, 1958.

c. Agent Costa, the arresting officer had been told of a statement made by Panzarella, to his fellow-agent Moynihan (who was not present at the time of petitioner's arrest), that DiBella was Panzarella's source of supply.

d. Costa did not observe any transfer of anything between DiBella and Panzarella.

e. Panzarella had not given Moynihan or Costa correct information on other occasions.

f. Similar information that DiBella was a supplier of narcotics had not been given to Moynihan or Costa by other sources of information.

g. DiBella was not a narcotic addict.

In *Draper* v. *United States*, 358 U. S. 307 and in *Jones* v. *United States, supra*, the information given to the officers came from a reliable informant. In the present case there was no proof that Panzarella's information could be relied upon and that based on previous dealings he was a reliable informant.

In *Jones* v. *United States*, 266 F. 2d 924, 929 (D. C. Cir.), the court said on page 929:

> "The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible persons who may be motivated by self-interest, spite or even paranoia. The only other safeguard which remains rests not on law but on the good will of the police officer."

In *Jones* v. *United States, supra*, on page 271, Justice Frankfurter stated:

> "* * * Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously give accurate information. This story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

In our case, there was no proof that DiBella was a user of narcotics. There was no corroboration through other sources of information. The only proof adduced by the Government to corroborate Moynihan's statement to Costa, were the two observations made by Costa when he had seen DiBella and Panzarella meet. Certainly DiBella's two meetings with Panzarella were to all outside appearances a more innocent association than the two trips Henry and his confederate made in *Henry* v. *United States*, 361 U. S. 98.

See: Dissenting opinion of Judge Waterman (Appendix B, *infra* pp. 50, 51).

In the *Jones* and *Draper* cases, the information was given by a reliable informant directly to the arresting officer. In the present case, the information was alleged to have been given by Panzarella to Moynihan who then re-

lated it to Costa. This would be hearsay upon hearsay and an unwarranted extension of the rule that hearsay may be the basis for a warrant if reasonably substantiated.

However, this hearsay upon hearsay statement of Moynihan to Costa was not reasonably corroborated. It did not create sufficient probable cause for a search warrant. Undoubtedly, that is the reason why Commissioner Abruzzo denied the application for a search warrant (51a-52a). Since there was not sufficient probable cause for a search warrant, there could not be sufficient probable cause for the warrantless arrest of the petitioner.

5. The arrest of the petitioner was but a pretext to search his apartment. The warrant to arrest petitioner was issued on October 15, 1958. It was executed on March 9, 1959 (21a-22a). It is evident that petitioner could have been arrested at anytime after the issuance of the warrant. No proof was offered by the Government to explain why they entered petitioner's apartment, in the night-time to make the arrest.

As Judge Waterman stated (Appendix B, *infra*, p. 58 postscript):

> "• • • I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant."

In *Jones* v. *United States*, 357 U. S. 493, on page 500, Justice Harlan stated:

> "• • • The testimony of the federal officers make clear beyond dispute that their purpose in entering

> was to search for distilling equipment, and not to arrest petitioner. Since the evidence obtained through this unlawful search was admitted at the trial, the judgment of the Court of Appeals must be reversed."

In *Worthington* v. *United States*, 166 F. 2d 566 (6 Cir.), Judge McAllister said:

> "All the circumstances disclose that the arrest was made as a pretext to search for evidence, and on that ground alone, the evidence should have been suppressed."

See:

United States v. *Lefkowitz*, 285 U. S. 452.

CONCLUSION

This case presents important questions in the administration of criminal justice, more particularly a defendant's standing to challenge the legality of a search in the circumstances of this case. The decision below radically impairs and whittles away rights guaranteed under the Fourth Amendment. The relationship of the Narcotics Control Act as it impinges upon the Fourth Amendment has never been decided by this Court. The question whether a narcotics agent may enter a suspect's dwelling in the night-time without a search warrant or a valid warrant of arrest and search the premises has not previously been presented to this Court, and should be settled by it.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

APPENDIX A

Opinion of United States District Court

UNITEL STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 2225

[SAME TITLE]

Appearances:

JEROME LEWIS, Esq.,
Attorney for defendant Mario DiBella,
For the Motion.

HON. CORNELIUS W. WICKERSHAM, JR.,
United States Attorney.
By CHARLES L. STEWART, Esq.,
Assistant United States Attorney.
In Opposition.

RAYFIEL, *J.*

The defendant, Mario DiBella moves under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress all evidence seized in his apartment at 35-15 80th Street, Jackson Heights, Queens County, New York, on March 9, 1959 by agents of the Federal Bureau of Narcotics, as well as any and all evidence gleaned herefrom, on the ground that the search and seizure was unlawful, being violative of the Fourth Amendment of the Constitution of the United States and of Rules 3 and 4 of said Rules.

The defendant bases his motion on the following three grounds:

1. that the warrant of arrest was invalid because the complaint on which it was based did not state facts sufficient to show probable cause;

2. that this arrest under said warrant was used as a pretext to make an exploratory search of the defendant's apartment; and

3. that the warrant was invalid because it bore the date October 6th, 1958, while the complaint on which it was based was dated October 15th, 1958.

As to the third ground, it is palpable that the error in date was inadvertent. Both the warrant and the complaint on which it was based, were *originally* dated October 6th, 1958. The date on the complaint was changed in ink to October 15th, 1958 when it was sworn to before Commissioner Epstein. The date on the warrant, however, was not changed and was thus signed by the Commissioner. This was clearly an oversight and should and does not affect the validity of the warrant, which obviously, was issued on October 15th, 1958. As a matter of fact defendant's counsel, in the statement of undisputed facts contained in his brief, alleges "1. That on the *15th* day of October, 1958 a warrant was issued . . ." (Emphasis supplied.)

As to the failure of the complaint to state facts showing *probable cause.*

The complaint alleges on *information and belief* that "the defendants, *Mario DiBella* and *Samuel Panzarella,* did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: ap-

proximately one ounce of heroin hydrochloride, a derivative of opium. . . ."

The following paragraph states "That the source of your deponent's information and the grounds for his belief are *your deponent's personal observations in this case*, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics." (Emphasis added.)

Doubtless the complaint was inexpertly drawn. It alleges, *on information and belief*, that the sale of the heroin took place on September 10th, 1958, and then goes on to say that the *source* of the complainant's information and *grounds* for his belief, are, among other things, *his own observations*. Obviously, if the sources of his information were his own observations, then he had *personal knowledge* of the facts.

I have read the statements of Agents Costa and Moynihan which are set forth in Appendix B and C, attached to the affidavit submitted in opposition to this motion by Assistant United States Attorney Charles L. Stewart. These statements were originally attached to an application for a search warrant made before Commissioner Abruzzo, who denied the same. I have considered them as having been submitted in opposition to this motion.

Agent Moynahan's statement alleges that he had met one Samuel Panzarella, a co-defendant of DiBella, who offered to sell him heroin, the sale to take place at 8:00 A.M. on August 26, 1958; that he met Panzarella in Manhattan at 6:00 A.M. on that day and was told by him that he wanted to call his source of supply, whereupon Panzarella made a telephone call, after which he and the agent drove to 79th

Street, north of Roosevelt Avenue, in Jackson Heights, Queens, New York, where they parked; that Panzarella then left the vehicle, walked to 79th Street and 37th Avenue, and entered a green Chrysler automobile bearing New York license number 6971 N E; that he observed Panzarella leave that vehicle several minutes later at 79th Street and Roosevelt Avenue and return to the car in which he, the agent, was waiting, after which Panzarella handed him a glassine envelope containing a white powder, which subsequent tests proved to be an ounce of heroin hydrochloride. That on September 10th, 1958 a similar series of events occurred: at 9:30 P.M. on that day he met Panzarella in Manhattan, was told by him that he would have to go to Jackson Heights to meet his source of supply, and after Panzarella made a telephone call they both went to 74th Street and Roosevelt Avenue; Panzarella then left the agent, met the defendant Mario DiBella, walked with him from 74th Street to 37th Road and then returned to the agent; they both drove back to Manhattan, and enroute Panzarella handed him a glassine envelope containing heroin hydrochloride, and stated to him that DiBella was his source of supply and had supplied the heroin which has been sold to the agent on August 26th, 1958 and September 10th, 1958.

Agent Costa's affidavit alleges that on August 26th, 1958, at 7:30 A.M. he saw the defendant Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, enter his Chrysler automobile, license number 6971 N E, drive to 37th Avenue and 79th Street where he met Panzarella, who entered the car, and DiBella then drove to Roosevelt Avenue and 79th Street, where Panzarella left the car and walked to 78th Street, where he met Agent Moynihan, to

whom he handed a small envelope the contents of which later tests showed to be heroin hydrochloride; that at 11:00 P.M. on September 10th, 1958 he observed DiBella leave Apartment 42 at 35-15 80th Street, Jackson Heights, walk to Roosevelt Avenue and 74th Street, where he met Panzarella, and then walked with him to 76th Street near Roosevelt Avenue, where they separated, after which Panzarella met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he stated he had obtained from DiBella.

It is evident from these statements that Agent Costa had personal knowledge of the events which led to DiBella's arrest. He so stated in the affidavit which he submitted in support of the application for the warrant which was issued by Commissioner Epstein on October 15th, 1958 and executed on March 9th, 1959.

The facts in this case are infinitely stronger than those in *Giordenello* v. *United States*, 357 U. S. 480, cited by the defendant in his brief. There the names of the witnesses were left blank in the complaint on which the warrant was issued, and the agent testified that when the warrant was issued "his suspicions of the petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits" (p. 485). The Supreme Court there held that this complaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made."

In the case at bar Agent Costa had had the defendant under observation. He saw him meet Panzarella on two occasions, after which the latter made sales of heroin to

Agent Moynihan. The complaint names Panzarella as a person who made statements in the case, and alleges that the sources of the agent's information were his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case and the reports and records of the Bureau of Narcotics." The facts in the case at bar are similar to those in the case of *Lathem* v. *U. S.*, 259 F. 2d 393, where the Court said at page 398, "Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement from an affiant with personal knowledge. Unlike the *Giordenello* case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion." In my opinion the complaint herein was sufficient and the warrant was properly issued thereon.

However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Act sufficiently reasonable to justify his arrest without a warrant. Section 7607 of Title 26, U. S. Code, states that among others, Agents of the Bureau of Narcotics may "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

In the recent case of *Draper* v. *United States*, 358 U. S. 307, an Agent of the Bureau of Narcotics in Denver arrested the defendant without a warrant after having been advised by one Hereford, a "special employee", that the defendant was peddling narcotics, that he had gone to Chicago to purchase heroin, and would return to Denver with it on September 8th or 9th, 1956. Hereford gave the Agent a physical description of the defendant and the clothes he was wearing, informed him that he would carry a tan zipper bag, and that he habitually walked fast. On the morning of September 9th the Agent saw a person answering that description and carrying a tan zipper bag, alight from an incoming Chicago train at the Denver station and walk quickly toward the exit. The Agent, accompanied by a police officer, arrested defendant, searched him and found two envelopes containing heroin clutched in his left hand in his raincoat pocket. The defendant attacked the arrest and subsequent search and seizure as violative of the Fourth Amendment, in that the information given by Hereford to the Agent was hearsay and could not be considered by him in determining whether there was probable cause, and that the Agent's information was insufficient to meet the test of "probable cause" and the requirement that there be reasonable grounds for believing a violation had taken place.

The Supreme Court rejected both arguments. It held, at pages 311 and 312, that *Brinegar* v. *U. S.*, 338 U. S. 160, had decided that there was "a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunal which determine them, and

therefore a like difference in the *quanta* and modes of proof required to establish them." 338 U. S. at 172, 173. The Agent, therefore, they hold properly considered Hereford's information, even though it was hearsay, in arriving at "probable cause."

The decision went on to say at page 313 "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* v. *United States*, *supra*, at 175. *Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll* v. *United States*, 267 U. S. 132, 162." (Emphasis added.)

In the case of *United States* v. *Walker*, 246 F. 2d 519, Circuit Judge Finnegan reviewed the whole field of the law respecting arrests without a warrant, and stated at page 527, "Reasonable ground then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interpose the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial

branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible pattern of instances, excusing law-enforcement officers for by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within constitutional bounds of reasonableness as officially or pragmatically defined as case-law. Fresh combinations of facts must necessarily be examined under the terms labelled 'probable cause' and 'reasonable grounds' for neither one is a static concept. But the criteria embedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an *inkling only. For he must act as a man of reasonable caution. 'Suspicion' is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself.*" (Emphasis added.)

It is my opinion that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Acts on August 26, 1958 and September 10, 1958, on both of which occasions he had *personally* observed him meet

Panzarella immediately prior to the sales of heroin to Agent Moynihan, about which he was told by the latter, who is clearly a more reliable source of information than were the informers in the *Draper* and *Walker* cases, *supra*. Agent Costa could, therefore, have arrested the defendant DiBella without the warrant on March 9th, 1959.

The arrest having been properly made, I find that the search incident thereto was proper, and that the evidence resulting therefrom was not illegally obtained.

The motion is in all respects denied, without prejudice, however, to a renewal thereof on the trial.

Settle order on notice.

Dated: November 4th, 1959

LEO F. RAYFIEL
United States District Judge

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 349—October Term, 1959.

(Argued June 14, 1960 Decided November 23, 1960.)

Docket No. 26049

MARIO DIBELLA,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

WATERMAN, MOORE and HAMLIN,*

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Rayfiel, *J.*, denying a motion for the suppression of evidence obtained by means of an allegedly unlawful search and seizure. Affirmed.

JEROME LEWIS, *for appellant.*

CORNELIUS W. WICKERSHAM, JR., United States Attorney, Eastern District of New York (Joseph J. Marcheso, Assistant United States Attorney, of counsel), *for appellee.*

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* Of the Ninth Circuit, sitting by designation.

Appendix B—Opinion of United States Court of Appeals

HAMLIN, *Circuit Judge*:

Mario DiBella, appellant, appeals from an order of the District Court denying his motion to suppress certain evidentiary items seized in his apartment by agents of the Federal Bureau of Narcotics on March 9, 1959, at the time of his arrest. The motion was made after arrest and arraignment of appellant but before his indictment.

On November 30, 1959, subsequent to his indictment, the motion was denied by the District Court, with leave to renew it at the time of trial. On December 3, 1959, appellant gave notice of appeal to this Court from the order of the District Court. There has as yet been no trial of appellant.

Initially, the United States, appellee, raises the question as to whether such an order is appealable.

Over a period of many years this Court has consistently held that where the application is made prior to indictment, as it was in this case, that a defendant may appeal to this Court from an order denying his motion to suppress. *United States* v. *Poller*, 43 F. 2d 911 (2 Cir. 1930); *Cheng Wai* v. *United States*, 125 F. 2d 915 (2 Cir. 1942); cf. *United States* v. *Klapholz*, 230 F. 2d 494 (2 Cir. 1956); *United States* v. *Russo*, 241 F. 2d 285 (2 Cir. 1957).

We hold the order made by the District Court in this case to be appealable.

The motion was argued before the District Court by counsel on either side and affidavits and counteraffidavits were presented for his consideration. From the showing there made, the following factual situation appeared. On

October 15, 1958, one David W. Costa, a special agent of the Federal Bureau of Narcotics, presented to United States Commissioner Epstein in the Eastern District of New York a complaint praying for the arrest of appellant. This complaint stated:

> "That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York * * * unlawfully sell, dispense and distribute a narcotic drug, to-wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law * * *
>
> "That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

Upon the basis of this complaint Commissioner Epstein issued a warrant of arrest.

On March 9, 1959, the narcotic agents saw appellant sitting in his living room in his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other agents to appellant's apartment. It was nighttime. The agents rang the bell and the door was opened by appellant's stepdaughter. The agents identified themselves, showed her their credentials, and walked into the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed

him under arrest. A quantity of narcotics was found, which, together with other items, the agents seized.[1]

In *Application of Fried*, 68 F. Supp. 961, consideration was given to the sufficiency of a complaint upon which a warrant of arrest was issued. There, the complaint, after alleging that the defendants had in their possession certain goods and chattels knowing the same to have been stolen, contained the following statement:

> "The sources of deponent's information and the grounds of his belief are an investigation conducted by him in the course of his official duties."

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[1] The foregoing facts are undisputed. The only substantial conflict in the affidavits concerns the circumstances of the search. According to the affidavit of the Assistant United States Attorney the agents asked DiBella if he would permit them to make a search of the apartment. Appellant then told one of the agents "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." Appellant then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to "cut" the narcotics. Appellant then stated that this was all the heroin he had in his possession. Approximately $8,675 was found in the apartment, and appellant later admitted that this money represented profits which he had made in the sale of narcotics. Appellant also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

An affidavit filed by DiBella's counsel presents a different version of the events following DiBella's arrest. According to this affidavit "About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

DiBella's affidavit is not contrary to either of the above affidavits but merely states that the agents, after exhibiting to him the warrant for his arrest, "proceeded to make a general exploratory examination of my apartment. They discovered a quantity of narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items."

Under either version it does not appear that the search of appellant's apartment was an unreasonable one.

The Court there held "Such a complaint will not support a warrant of arrest. U. S. v. McCunn, D. C. S. D. N. Y., 1930, 40 F. 2d 295; United States ex rel. King v. Gokey, D. C. N. D. N. Y., 1929, 32 F. 2d 793; • • • United States v. Pollack, D. C. N. J., 1946, 64 F. Supp. 554; United States v. Rurolde, D. C. S. D. N. Y., 220 F. 210."

Recently the question of the sufficiency of a complaint to justify a warrant of arrest was considered in *Giordenello* v. *United States*, 357 U. S. 480.

The complaint in that case read as follows:

> "The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas • • •, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; • • •
>
> "And the complainant further states that he believes that .... are material witnesses in relation to this charge."

In striking down the complaint as insufficient in that case, the Court said:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further said:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential

> facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it * * *' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '* * * no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized,' of course applies to arrest as well as search warrants."

We hold that the complaint upon which the warrant of arrest was based was deficient in this case, and would not support the warrant of arrest which was issued under it. It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics," but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless "other witnesses" or the unidentified "reports and records." The complaint is no better than that in *Giordenello* v. *United States*, and the warrant is invalid for the same reasons.

Appellee, however, contended in the court below (as it contends here) that regardless of any objection of appellant that the warrant of arrest was improperly issued, that Agent Costa had probable cause to effect a valid arrest of appellant under the authority of 26 U. S. C. §7607, which states that, among others, agents of the Bureau of Narcotics may:

> "(2) Make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The District Court, in its opinion agreeing with the position of appellee, stated: "However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant." To properly evaluate this contention, we shall examine some of the further facts that were presented upon the hearing to the District Judge.

It appears that on October 6, 1958, Agent Costa and another agent, one Daniel D. Moynihan, in an endeavor to obtain a search warrant each signed and presented to United States Commissioner Abruzzo an affidavit which set forth the knowledge each agent had from personal observation and from information received, concerning the ac-

tivities of appellant in connection with possession and sale of narcotics.

These affidavits set forth in detail certain events occurring on August 26, 1958, and on September 10, 1958, from which it could be inferred that there was a sale of narcotics on each of those two occasions by appellant to the narcotics agents through one Panzarella. These affidavits are set out in full in a footnote.[2]

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[2] [AFFIDAVIT OF DAVID W. COSTA]

EASTERN DISTRICT OF NEW YORK, *ss.*:

DAVID W. COSTA being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order form in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

A search warrant was not issued by United States Commissioner Abruzzo, to whom the affidavits were presented, but the affidavits were presented to the District Judge for his consideration on the instant motion to suppress.

In *Draper* v. *United States*, 358 U. S. 307, at 310, it was held that where a narcotic agent had "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of the Narcotic Control Act to believe that a person had committed or was committing a violation of the narcotics laws, he could make a

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At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samuel Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel Panzarella then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

[AFFIDAVIT OF DANIEL D. MOYNIHAN]

EASTERN DISTRICT OF NEW YORK, *ss.*:

DANIEL D. MOYNIHAN being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together

lawful arrest. The Court there said, quoting *Brinegar* v. *United States*, 338 U. S. 160, 172-173:

> " 'There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them.' "

At page 313, the Court said:

> " 'In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are

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with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quality of narcotic drugs, namely: heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958, your deponent met Samuel Panzarella in Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971NE.

> not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States, supra,* at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162."

In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.

Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his "connection," and that he would telephone his "connection." Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. Enroute, Samuel Panzarella handed a glassine envelope containing a white powder to

An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under the surveillance of each agent. On August 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope

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your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September 10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected; that Mario DiBella has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by Daniel D. Moynihan on October 6, 1958.)

which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had "reasonable grounds to believe" that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from his own observation and from information received from Moynihan, Costa would have indeed been naive if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was "a substantial basis for crediting" the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones* v. *United States*, 362 U. S. 257, 269. We

hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws.

Appellant contends, however, that the delay from September, 1958, until March, 1959, when the arrest was made, was sufficient to say that in March, 1959, Costa did not have reasonable grounds to believe that DiBella had committed a narcotics violation. We cannot so hold.

An explanation was given by appellee that the delay was occasioned by a desire on the part of the agents to uncover further violations. Be that as it may, we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September, 1958, of appellant's apparent violations of the narcotics laws.

When appellant was arrested on March 9, 1959, Costa had in his possession the warrant of arrest which had been issued October 15, 1958, and after arresting appellant under color of this warrant, which we have held to have been invalidly issued, made a return on it showing that he had executed the warrant by arresting DiBella on the 9th day of March, 1959.

We do not believe that this helps appellant. Although Costa apparently believed that this warrant was a valid one, yet, even though it was not, the arrest may be justified on the ground that Costa had reasonable grounds to believe that DiBella had committed a narcotics violation.

In *Williams* v. *United States*, 273 F. 2d 781, the arrest was made upon a warrant of arrest which the Court held

to be invalid. However, the arrest was justified on the basis of the arresting officer having reasonable grounds to believe a violation had been committed.

In *Giordenello* v. *United States, supra,* the Supreme Court held that the warrant of arrest was invalid. The case points out, however, that in the Supreme Court, for the first time, the Government contended that the arrest could be justified without a warrant on the basis that there was probable cause to believe that the person arrested had committed a felony. The Supreme Court held that these contentions by the Government, having been made for the first time before that Court, were belated, and refused to consider them. The case was reversed, but the Supreme Court stated:

> "This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying upon the warrant."

The arrest of DiBella by Costa, who, on March 9, 1959, had reasonable grounds to believe DiBella had committed a violation of the narcotics law, was a lawful arrest. The arrest being lawful, a reasonable search of appellant's premises, such as shown in this case, was proper. *United States* v. *Rabinowitz,* 339 U. S. 56.

Judgment affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I concur in the holding that, inasmuch as the motion was made prior to indictment, the denial of the motion to suppress is an appealable order. I also agree with my colleagues that the warrant of arrest is invalid under *Giordenello* v. *United States*, 357 U. S. 480 (1958) and earlier cases. However, I am unconvinced that Agent Costa had "reasonable grounds" for arresting DiBella without possessing a valid warrant for his arrest. Therefore, I would hold that the subsequent search of the DiBella home cannot be justified as incidental to DiBella's lawful arrest. Moreover, even assuming *arguendo* that the arrest was a lawful one, I disagree with the conclusion the majority reach that the subsequent search is justifiable as incidental to the arrest.

As the majority opinion sets forth, the "reasonable grounds" contemplated by the Narcotics Control Act, 26 U. S. C. §7607, are equivalent to the "probable cause" required under the Fourth Amendment, *Draper* v. *United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate "probable cause" need not be as great as that required for a determination of guilt. *Jones* v. *United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry* v. *United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper* v. *United States*, *supra*, *Brinegar* v. *United States*, 358 U. S. 160 (1949); *Carroll* v. *United States*, 267 U. S. 132 (1925).

In determining whether a law enforcement officer had "reasonable grounds" (i.e. "probable cause") to act as he

did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time.

The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of "upon probable cause" and an historical exemplification of that philosophy appears in *Henry* v. *U. S., supra.* There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

> And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day * * * [citing cases]. Its highwater was Johnson v. United States, supra [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.

There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

The *Carroll* and *Brinegar* cases, *supra,* dealt with violations of the federal liquor laws. Defendants in each case

were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion. Brinegar previously had been arrested by the same officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

Draper v. *United States, supra,* dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid "special employee" of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

In *Jones* v. *United States, supra,* the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corroborated by other informants. See 362 U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

What evidence is offered in this case to justify a judicial finding that Agent Costa had "reasonable grounds" (i.e., "probable cause") to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 DiBella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant.

Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy "special employee" in

Draper. This case is perhaps closest to *Jones*, but even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where Jones was discovered was pursuant to a valid search warrant issued by "an independent judicial officer."

It is interesting to compare the facts in the instant case with those in *Henry* v. *United States, supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been "implicated in interstate shipments" and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that "*Carroll* v. *United States, supra*, liberalized the rule governing searches when a moving vehicle is involved." But even under these circumstances the Court went on to say, "But that decision [Carroll]

merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause." (Emphasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios* v. *United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem* v. *United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon probable cause the courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States* v. *Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States* v. *Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U. S. 962 (1958); *United States* v. *Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams* v. *United States*, 273 F. 2d 781, 791 (9 Cir.), *cert. denied*, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here.

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. *United States* v. *Joines*, 258

F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States* v. *Joines*, *supra* (21 days); *Seymour* v. *United States*, 177 F. 2d 732 (D. C. Cir. 1949) (6 days); *State* v. *Kopelow*, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State* v. *Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent* v. *Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days). The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey* v. *United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer "may defer the arrest for a day, a week, two weeks, or perhaps longer." Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale "probable cause." I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on

October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale.

However, assuming that the officers had probable cause to arrest DiBella the search of his home cannot even then be justified. The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. *Abel* v. *United States*, 362 U. S. 217, 235, 80 S. Ct. 683, 695 (1960); *United States* v. *Rabinowitz*, 339 U. S. 56, 65-66 (1950). See *Rios* v. *United States*, *supra*, at 261, 80 S. Ct. at 1436. A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest. But as Justice Frankfurter pointed out this year in *Abel*:

> The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, with Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374, and United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, compare Go-Bart, supra, and Lefkowitz, supra, with Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, and United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; compare also Harris, supra, with Trupiano v. United States, 334

> U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, and Trupiano with Rabinowitz, supra (overruling Trupiano). Of these cases, Harris and Rabinowitz set by far the most permissive limits upon searches incidental to lawful arrests. 362 U. S. at 235, 80 S. Ct. at 695.

Although Justice Frankfurter, in *Abel*, was unwilling to attempt a reconciliation of the cases, he had on two prior occasions analyzed in detail the decisions involving searches and seizures incidental to arrests. *Harris* v. *United States*, 331 U. S. 145, 155-183 (1947) (dissent); *United States* v. *Rabinowitz, supra*, at 68-86 (dissent). From his analysis we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. *Harris* v. *United States, supra*. *Trupiano* v. *United States, supra*, restricted *Harris* by pointing out that such a broad search without a search warrant could only be condoned as incidental to a lawful arrest where there was a practical necessity for speed. The need for this showing was later rejected in *United States* v. *Rabinowitz, supra*. Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases.

Two factors distinguish the instant case. First, in *Harris* and *Rabinowitz* a *valid* warrant of arrest had been issued. Thus there had been a proper decision by a dis-

interested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant. *Draper* v. *United States, supra,* involved the search of a prisoner's person; *Brinegar* and *Carroll* the search of the prisoners' automobiles. It is certainly clear that "There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear." *United States* v. *Lancso,* 252 F. 2d 220, 223 (2 C.. 1958).

As Justice Douglas speaking for the Court has said:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search war-

rant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *McDonald* v. *United States*, 335 U. S. 451, 455-56 (1958).

Second, in further contrast to *Harris* and *Rabinowitz*, DiBella's arrest and the subsequent search of his residence occurred in the night-tin . Rule 41(c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to daytime execution unless the affidavit indicates positively that the objects to be seized are upon the premises. See also *Distefano* v. *United States*, 58 F. 2d 963 (5 Cir. 1932). In *Jones* v. *United States*, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41(c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause." To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases. Furthermore, the fact that the search uncovered narcotics cannot change the result, for "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948). Nor do I find persuasive the argument that such searches are necessary for the ef-

fective control of narcotics traffic. Justice Jackson, speaking for the Court, disposed of this argument in *United States* v. *Di Re, supra,* at 595:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

And as Justice Douglas said in his dissent in *Draper* v. *United States, supra,* at 314-15:

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.[1] To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States* v. *Rabinowitz, supra,* at 80 (Frankfurter, *J.*, dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents.

[1] There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.